United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7208, 76-7211

To be argued by
JOSEPH ARTHUR COHEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

BENITO LOPEZ,
Plaintiff-Appellee,

—against—

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

—against—

P/S

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,
Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THIRD PARTY DEFENDANT-APPELLANT AND APPELLEE, INTERNATIONAL TERMINAL OPERATING CO., INC.

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The Scope of This Reply Brief

The purpose of this Reply Brief is to deal solely with the contention set forth in HOFFMAN's brief that it is not liable for the negligence of its crane operator HOGAN merely because he was given signals by ITO.

Statement of Relevant Facts

As admitted in HOFFMAN's own brief, the crane being used to discharge the cargo in question was owned by HOFFMAN. It was operated by a man named HOGAN and it had an oiler named SPILLANE (244a). Both HOGAN and SPILLANE had been hired by HOFFMAN, were paid their salaries by HOFFMAN and had appropriate tax and other deductions withheld from their salaries by HOFFMAN (239a-241a, 257a-258a). When their services were no longer required, they were released from employment by HOFFMAN (239a-240a, 258a). They were told by HOFFMAN where to go and what to do (239a, 258a).

On October 21, 1968 when HOGAN and SPILLANE arrived at the pier with the crane, they went on board the vessel and determined themselves how the crane and its boom should be positioned (240a-241a, 258a).

It was admitted by SPILLANE that he and HOGAN were the only HOFFMAN personnel at the pier at the time of the accident in question, and that HOFFMAN was their employer (242a-243a). HOGAN also testified that he and SPILLANE were HOFFMAN employees, but thought there may have been another HOFFMAN crane with an operator and oiler working at some other hatch of this vessel (244a). It was the task of HOGAN, and SPILLANE under his supervision, to determine how the crane should be positioned for working the vessel (244a-245a).

While the draft being worked is down in the hold and not visible to the crane operator, an ITO signalman would give him signals (48a-49a, 78a). The unsignalled-for topping of the boom was a decision made solely by HOGAN (262a).

POINT I

The mere fact that Hogan received signals while a draft was down in the hold and not visible to him does not mean that he left the employ of Hoffman.

It appears to be the argument of HOFFMAN that its crane operator, HOGAN, had somehow passed out of its employ because he received signals from an ITO signalman while the draft was in the hold and not visible to him. However, the leading decision on "borrowed servants", *Standard Oil Company* v. *Anderson,* 212 U.S. 215, 29 S. Ct. 252 (1909) is on all fours with the instant action and holds squarely against HOFFMAN's contention. The *Standard Oil* case involved a winchmen hired and paid by the defendant, who alone had the right to discharge him (just as HOGAN here was hired and paid by HOFFMAN, who alone had the right to discharge him). In the *Standard Oil* case the winchman needed hoisting and lowering signals from employees of the stevedore (just as HOGAN here needed such signals from an employee of ITO). In the *Standard Oil* case the winchman was negligent because he lowered a draft without receiving a signal to do so (just as HOGAN in the instant case was negligent in topping the boom without a signal to do so). In the *Standard Oil* case the giving of signals by employees of the stevedore was urged by the employer of the negligent winchman as constituting a change in employer of the winchman (just as

HOFFMAN is here contending that the signalling by ITO made its negligent crane operator, HOGAN, the employee of ITO).

In rejecting such argument by the defendant in the *Standard Oil* case (the same argument here made by HOFFMAN) the Supreme Court stated:

> "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters."

In *Shenker* v. *Baltimore and Ohio Railroad Company,* 374 U.S. 1, 83 S. Ct. 1667 (1963) the Supreme Court again had occasion to consider the "borrowed servant" doctrine and reaffirmed what it had long before said in *Standard Oil Company* v. *Anderson, supra,* that the giving of signals or directions is only a "minimum cooperation necessary to carry out a coordinated undertaking" and does not bring about a change in employer status.

HOFFMAN paid HOGAN to operate its crane and it remained HOGAN'S employer and liable as such for his negligence, *Dornan* v. *U.S.,* 460 F. 2d 425 (1972).

In *Cijeck* v. *Crane Service Company,* 351 F. 2d 788 (1965) the Court considered the problem of *respondeat superior* liability when dealing with leased cranes, and it

made an interesting distinction. It stated that the crane operator's own general employer is the one liable for that operator's failure to operate with an appropriate degree of care and skill; but that the responsibility might be that of the lessee if the injury were caused not by any negligence of the crane operator in the operation of the crane but rather because of a foolhardy or careless utilization of the crane. In the instant case, we are dealing with a negligent act of the crane operator, HOGAN, in topping the boom without having received any signal to do so, and knowing that such a maneuver would cause the draft to swing inshore. For that kind of negligent operation by HOGAN, HOFFMAN is liable.

In a similar case in this Circuit, *Williams* v. *Pennsylvania Railroad Company,* 313 F. 2d 203 (1963), the crane operator, Wall, was in the employ of Pennsylvania Railroad Company and operated a crane on signal from Alexander, who was in the employ of the third party defendant, Spencer. Notwithstanding that Wall received pay from Spencer as well as from Pennsylvania, and that he had an ID card from Spencer, this court held that he was still the servant of Pennsylvania.

In conclusion, we would advert back to *Standard Oil Company* v. *Anderson, supra,* and refer to the following pertinent language:

> "The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the

> stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control."

The evidence in this case was that HOFFMAN was HOGAN'S employer. The fact that HOGAN was to receive some signals from ITO (which he did not follow) does not operate to make ITO his employer. The court below correctly held that HOFFMAN was liable for HOGAN'S negligence.

CONCLUSION

The accident in question and the injuries sustained by LOPEZ were caused by the active negligence of HOGAN in improperly topping the boom of the HOFFMAN crane. HOFFMAN was HOGAN'S employer at the time and must be held responsible for such negligence on HOGAN'S part. As we indicate in our main brief, the judgment herein should be so amended as to impose full liability on HOFFMAN for the amount of the plaintiff's recovery.

Respectfully submitted,

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Service of 2 copies of this within
Reply Brief is admitted this
13 day of August 1976.

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